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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. [redacted]

J. M. FIELDS, INC.,

Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1066

J. M. FIELDS, INC.,

Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

I.

INTEREST OF THE AMICUS CURIAE*

The American Retail Federation (hereafter "ARF") is an organization composed of seventy-eight national and state retail associations, the membership of these associations consists of a wide variety of retail businesses, ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the ARF

* Pursuant to Rule 42(1) of the Rules of the Supreme Court of the United States, the written consents of all parties hereto have been obtained and have been lodged with the Clerk of the Court.

represents approximately eight hundred thousand retailers with close to six million employees.

The issue presented here—the proper standards to apply in determining the scope of injunctive relief under the Equal Pay Act (hereafter the "EPA")[1]—is an important question which is likely to recur in virtually every action instigated against multi-establishment employers. The ARF's interest in this case is therefore predicated on the far reaching consequences the resolution of this issue will have to retailers generally and the future administration of the Act.

Because of the absence of uniform judicial guidelines in equal pay cases, the Secretary has consistently urged in the lower courts that a company-wide injunction is necessary and appropriate whenever proof of violation is established at a single or several units of a multi-establishment or chain store enterprise. This *per se* position has been advocated without regard to the size or geographic distribution of the enterprise, the nature or complexity of the violations or pay practices involved or an employer's good faith affirmative efforts to comply with the law generally.

The Fifth Circuit's decision below—approving a nation and classification-wide injunction against an entire retail chain based solely upon an *ad hoc* finding of isolated violations at three of the employer's retail units—has, in direct conflict with the position of the Court of Appeals for the Second and Eighth Circuits[2], embraced the Secretary's position on grounds of "administrative necessity" and, thereby created a substantial conflict between the Circuits which has not yet, but should be resolved, by this Court. The instant case, accordingly, raises a matter of vital concern to all employers. It is for that reason that the ARF respectfully submits its views.

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1. Equal Pay Act of 1963, 29 U. S. C. Sec. 206(d).

2. See, *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226 (2nd Cir., 1973); *Hodgson* v. *American Can Co.*, 440 F. 2d 916 (8th Cir., 1971).

II.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal law which has not been, but should be, resolved by this Court. The imposition of a chain-wide injunction, absent proof of a policy of discrimination extending beyond the units or job categories where violations are established, conflicts with traditional enforcement standards heretofore applied by this and other courts under other regulatory statutes. Heretofore, the rule has always been that the scope of injunctive relief must bear some reasonable relationship to the proven violations. *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953). Accordingly, blanket orders extending beyond those violations established have been rejected, for example, in employment discrimination cases arising under the National Labor Relations Act absent a showing 'that they bear some semblance to that which the employer has committed or that their commission in the future is to be anticipated from their commission in the past." *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426 (1941).[3] This means, as this

3. Before enactment of the E. P. A., the courts uniformly rejected efforts to secure companywide injunctions under the parent Fair Labor Standards Act provisions where such relief was also predicated solely upon violations committed at only one or more of an employer's nationwide facilities. See, *e.g.*, *Lenroot* v. *Interstate Bakeries Corporation*, 146 F. 2d 325, 329 (7th Cir., 1943) involving the child labor provisions of the Act rejecting such blanket relief absent evidence that "the Act was violated throughout the system of bakery plants operated by the company." Indeed, the Fifth Circuit in *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395, 399 (5th Cir. 1941) set aside an injunctive prohibition against "violating any of the provisions" of the FLSA where, as here, allegations and proof were limited to specific violations at specific facilities because it went beyond ". . . such violations as were found to have been committed, and similar ones." *Hodgson* v. *First Federal Savings and Loan Assn.*, 455 F. 2d 818 (5th Cir., 1972) involving the FLSA discrimination provisions and principally relied upon by the decision below (Pet. for Cert., App. at p. 17a) is not to the *contra;* in that case the Secretary affirmatively established a policy of age discrimination "not only with respect to tellers and trainees", but with respect to other jobs" as well. *Id.* at 826.

Court explained in *W. T. Grant, supra,* at 633, that ". . . the moving party must satisfy the court that relief is needed [because] there exists some cognizable danger of recurrent violations, something more than the mere possibility of a future violation." To conclude, as the court below did, that *all employment categories* at *all of a multi-employer's establishments* must be encompassed within "an injunction of such general character where issues and proof . . . [are] . . . limited solely to . . ." isolated employer categories within only several individual establishments carves out an exception for EPA cases in breach of these elementary principles which is ". . . violative of the most elementary principles of justice." *New Haven & H. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 404 (1906),[4] This radical departure from established remedial principles for remedying wage discrimination violations, it is submitted, warrants this Court's review.

2. Consistent with traditional equitable relief standards, most courts[5]—including the Court of Appeals for the Second and Eighth Circuits have rejected this *per se* approach and refused to apply such blanket injunctive relief absent a showing of a policy of discrimination extending beyond the units and job categories where violations have been established. The Secretary's initial effort to secure appellate court approval for his position was flatly rejected by the Eighth Circuit in *Hodgson*

4. The Court of Appeals below, while sustaining the district courts' approval of a chain-wide injunction, initially reversed, *sua sponte,* the entry of an injunction covering all of Petitioner's employees "because there was no proof of discrimination in classes of employees other than Area Supervisors . . ." Upon the Secretary's petition for rehearing, the Court modified its opinion to encompass all other employment classifications far beyond the limited "class of employees involved in the litigation." *Pet. for Cert.,* App. pp. 18a-20a.

5. See, *Hodgson* v. *Corning Glass Works,* 474 F. 2d 226 (2nd Cir. 1973); *Hodgson* v. *American Can Co.,* 440 F. 2d 916 (8th Cir. 1971). See also, *Hodgson* v. *Robert Hall Clothes, Inc.,* 326 F. Supp. 1264 (D. C. Del., 1971) and *Hodgson* v. *Food Fair Stores, Inc.,* 329 F. Supp. 102 (D. C. Pa., 1971). But, *cf., Hodgson* v. *City Stores, Inc.,* 20 W. H. Cases 600 (N. D. Ala., March 9, 1972).

v. *American Can Co.*, 440 F. 2d 916 (1971) involving EPA violations at a single facility of the employer's vast network of national manufacturing facilities. These isolated violations and the employer's insistence upon judicially challenging the Secretary's administrative interpretations were deemed clearly insufficient by the Eighth Circuit to warrant the sweeping relief sought because of the absence of "evidence relating to the discriminatory conduct of American Can at its other plants." *American Can Co., supra* at 921. In agreement with this view, the Second Circuit in *Hodgsen* v. *Corning Glass Works*, 474 F. 2d 226, 236 (1973) similarly concluded that "absent a policy of discrimination which extends beyond the plants at issue . . ., there is no basis for a national injunction." This result is compelled, as the Court emphasized in quoting from this Court's decision in *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 435-436 (1941), because "the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction to broadly obey the statute and will subject the defendant to contempt proceedings if he should at any time in the future commit some new violation unlike and unrelated to that which he was originally charged." However, absent this Court's review of the decision below, and the establishment of clear enforcement guidelines suited to equal pay cases, the Secretary will continue to pursue employer-wide injunctive relief on an indiscriminate basis and the lower courts will continue to reach inconsistent results in cases of like kind and character. This is likely to result in a severe dislocation in the admin stration of the Equal Pay Act which this Court should not permit to occur.

3. By failing to require that the conduct restrained "be persuasively . . . related to the proven unlawful conduct" (*N. L. R. B.* v. *Express Publishing Co., supra,* the decision also erects an arbitrary presumption of collective guilt upon an entire enterprise. This result cannot be reconciled with the EPA's unique requirement that compliance be tested in a "job-by-job"

and individual "establishment" basis. Unlike the minimum wage, overtime restrictions and age discrimination provisions of the Fair Labor Standards Act, Title 29, U. S. C., Secs. 201, 206 (hereafter FLSA), which make no distinction between the practices and policies at an employer's separate facilities or between job categories, the EPA only prohibits discriminatory pay practices "within any establishment in which such employees are employed" where employees are performing "equal work on jobs, the performance of which requires equal skill effort and responsibility and which are performed under similar working conditions". 29 U. S. C. Sec. 206(d)[6] By failing to give any weight to these unique EPA features requiring that an employer's *compliance* with the equal pay standards be tested in an establishment-by-establishment and job-by-job basis,[7] and presuming a companywide lack of compliance, merely because

6. Moreover, in contrast to the difficult evaluation necessitated to "self police" EPA compliance, an employer can determine his compliance with FLSA minimum wage and overtime requirements by means of a simple arithmetical computation. Thus, where an employer is shown to violate these provisions at one of its establishments the application of a more stringent remedial standard which "shifts the responsibility for [future] compliance onto the employer's shoulders" may conceivably be warranted. App., p. 16a. See, *e.g.*, *Mitchell* v. *Ballenger Paving Company*, 299 F. 2d 29 (5th Cir. 1962), *cert. denied* 370 U. S. 922; and *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F. 2d 198 (6th Cir. 1967) involving wage and overtime violations in the construction industry where, given the employer's violations at one construction site, a presumption that it will do so on others, absent broad injunctive relief, is not unreasonable.

7. As confirmed by the Wage-Hour Administrator, whose interpretations are accorded substantial weight in construing the statute (*e.g.*, *Idaho Sheet Metal Works* v. *Wirtz*, 383 U. S. 190, 205 (1966)) an employer does not violate the statute by paying male employees in store A more than it pays female employees in stores B, C or D even if the work performed by each is "equal". ". . . where there are a number of distinct physical places of business in which an employer's employees are employed, *compliance* with the equal pay provisions must be tested within each establishment . . . by comparing the jobs and pay of only those employees . . ." 29 C. F. R. Sec. 800.1004 (1967); 32 F. R. 2378 (emphasis supplied).

of isolated violations at a few outlets,[8] the lower court has engrafted a new compliance test onto the statute which is not consonant with the statutory scheme. This Court should decide whether such an unprecedented and far-reaching result, notwithstanding the express EPA language establishing a different compliance test, is warranted.

3. The decision below is predicated, in large part on "considerations of administrative necessity"[9]: that a contrary result "would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations at all of the defendant's branches to justify the issuance of a chain-wide injunction" App. at 17a. Such critical "policy considerations", affecting potentially all multi-establishment defendants in EPA cases, should finally be determined, by this Court, given the apparent contrary Congressional intent. Moreover, the basic assumptions of the Court of Appeals decision are erroneous. *First*, national injunctive relief could be warranted, even absent proof of violations at every establishment, where shown to bear a reasonable relationship to the proven violations,

8. Typically, a national retail organization will have dozens of employee categories, each performing different and, in most instances, unrelated work. Yet, if the lower court's views were to prevail, a violation respecting a single department manager in one retail establishment could be used to justify the extension of injunctive relief to employees in other establishments, in other departments, and engaged in unrelated functions, *e.g.*, mechanical service, delivery, security, maintenance, credit, auditing, accounting and real estate. Congress could not have intended such an incongruous result especially since, under the EPA's special job-by-job compliance test, a close factual scrutiny is required for even related jobs to determine where a violation has been established. See, *e.g.*, *Hodgson* v. *Brookhaven Hospital*, 436 F. 2d 719 (5th Cir., 1970).

9. "Administrative necessity" is, of course, the orthodox rationale for all punitive measures. That reason is, as the Supreme Court emphasized in *New Haven & H. R. Co.*, *supra* at 404, unacceptable, since its effect is to remove an employer from the "protection of the law of the land," and require that he "thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction."

and to the probability of future violations.[10] Where, for example, a chain-wide employer has a past history of a pattern and practice of similar violations at a significant percentage of his separate establishments and the application of "strong medicine" is necessary to deter future violations,[11] or the proven violations are the necessary product of a *uniform and nationally administered wage program* and relief is necessary to remove the root cause of the violation,[12] such extraordinary relief would then be appropriate. *Second*, the assumption that a chain-wide injunction is appropriate because it only says, "do what the law requires" (Pet. for Cert., App. p. 16a), is a gross over-simplification, particularly in equal pay cases. As noted, it is not always possible to know with certainty what the law does require under

10. As shown above, traditional equity standards require that there be an essential nexus between the proven violations and the scope of any remedy proposed under a remedial statute. ***NLRB*** v. *Express Publishing, supra.* The "mere possibility" that violations have or may occur elsewhere is plainly an insufficient standard by which to measure the necessity for broader injunctive relief. *United States* v. *W. T Grant Co.*, 345 U. S. 629 (1963).

11. The Courts have properly sanctioned extraordinary remedies when necessary to restrain an employer whose past "flagrant violations" demonstrate a proclivity to ignore the purposes and policies of the law. See, *e.g., J. P. Stevens & Co.* v. ***NLRB***, 417 F. 2d 533 (5th Cir., 1965).

12. Manifestly, the elements of "centralized control" relied upon by the lower court here cannot satisfy this standard. Petitioner's national wage administration, like that of large retail concerns generally, is limited to the establishment of broad "salary ranges appropriate for different geographic areas and classes of employees" (Pet. for Cert., App., p. 5a) with local management assuming the responsibility for initially fixing individual rates and subsequent pay increases subject only to final perfunctory "approval by . . . regional personnel" or corporate headquarters. Such "wage centralization", with the home office only establishing broad salary ranges within which local management may freely operate, do not produce equal pay violations since the "differences or similarities in each [job in each establishment] must determine the ultimate outcome under the Equal Pay Act." *Hodgson* v. *Golden Isles Nursing Homes, Inc.*, 468 F. 2d 1256, 1258 (5th Cir., 1972). Only where there is a direct established nexus between pervasive violations of the law, and nationally or centrally administered directives can centralized control justifiably be the basis for a national injunction.

the EPA;[13] where reasonable differences exist, an employer should be free to challenge the Secretary's determinations ". . . unfettered, in the process, by the prospect of contempt proceedings". *Mitchell* v. *Hodges*, 238 F. 2d 380 (5th Cir., 1956). Few national employers will take that risk, however, if it means being subjected to either a chain-wide or classification-wide injunction.[14] The Secretary will then become the final arbiter of EPA interpretations, removing the courts from their intended role.[15] Indeed, given the complexity of the EPA and the variety of circumstances presented in most equal pay cases, judicial clari-

13. In addition to making a close factual scrutiny of each job based upon the actual work performed (*Hodgson* v. *Brookhaven General Hospital, supra.*) to determine whether the three separate tests—"equal skill, equal effort and equal responsibility"—for equal-pay responsibility have been met (See 29 C. F. R. Sec. 800.122), an employer may also be relieved of any obligation even if job "equality" is shown if the pay differential is predicated upon any one of the following additional enumerated Section 6(d) factors: (1) seniority systems; (2) merit systems; (3) systems which measure earnings by quantity or quality of production or (4) any factor other than sex. The incorporation of these factors, as the Report of the House Committee reporting favorably on the legislation underlines, "recognizes that there are many factors which may be used to measure the relationship between jobs and which establish a valid basis for a difference in pay . . ." 109 Cong. Rec. 9210.

14. The sanctions which violations of an injunction may bring cannot be minimized: An injunction, once entered, may apply indefinitely (*e.g., Wirtz* v. *Graham Transfer*, 322 F. 2d 650, 5th Cir., 1963), and subject an employer to substantial fines, attorneys fees or even criminal convictions, if it is breached. See, *e.g., Tobin Barreda*, 9 W. H. Cases 534 (D. C. Pr., 1950) (the Secretary sought and obtained a contempt citation 10 years after the entry of the original decree); *Frost-Arnett Co.* v. *Tobin*, 264 F. 2d 246 (6th Cir., 1959) (court may order employer found in civil contempt to pay fine to compensate government for expenses in investigating and prosecuting contempt); and *Mitchell* v. *Maynard*, 13 W. H. Cases 434 (D. C. Ala., 1957) (employer could be imprisoned until he satisfactorily complied with disobedience of prior order).

15. The Secretary's interpretations, although entitled to appropriate respect, are not conclusive on the courts. In contrast to "legislative" rules or regulations having the force of law, the Secretary's guidelines are "interpretative" opinions which have validity only to the extent that they constitute a correct construction of the statutory requisites. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

fication is often essential,[16] and frequently the Secretary's interpretation will be rejected.[17] These unwarranted ramifications should have, but were not, considered by the lower court in its decision.

4. Although a substantial proportion of retail sales in this country are made today by large retail concerns doing business in hundreds and, in many instances, thousands of separate and widely distributed retail establishments, retailing remains an essentially local operation[18] where, because individual wage rates must be set locally to reflect local market conditions, inadvertent pay violations will occur despite substantial affirmative efforts by parent headquarters to police compliance with the EPA requirements. To utilize such "affirmative action" to make an employer as a "willful" violator and, inferentially at least, as the proper subject for a national injunction, clearly serves to penalize and discourage such voluntary centralized "affirmative action" efforts while rewarding those who ignore their public responsibilities. Yet, this is precisely what the lower court's

16. Given the EPA's complexities, the courts themselves will frequently differ concerning identical job classifications. Thus, the district courts have split equally on the decision of whether male orderlies and female nursing aides have equivalent jobs. For example, see: *Schultz* v. *Kentucky Baptist Hospital*, 19 W. H. Cases 403 (D. C. W. D. Ky., 1969) and *Hodgson* v. *Good Shepherd Hospital*, 19 W. H. Cases 1067 (D. C. E. D. Tex., 1971) where the jobs were held non-equivalent; and *Hodgson* v. *Hubbard Hospital*, 20 W. H. Cases 248 (D. C. M. D. Tenn. 1971) and *Hodgson* v. *Lancaster Hospital Association* (D. C. E. D. Pa., 1971) 20 W. H. Cases 139, where the opposite results were reached.

17. See, *e.g.*, *Hodgson* v. *Robert Hall Clothes, Inc.*, 473 F. 2d 589 (3rd Cir., 1973) rejecting the Secretary's view that economic benefit to the employer cannot be used to justify wage differentials between sales-persons in the men's and women's clothing departments.

18. National chain stores typically have a unit situated in every small town and city in this nation. In 1963, there were over 1.7 million of such individual retail establishments covering the length and breadth of the country and this trend has increased substantially since that time. See Applebaum, *Consumption and Geography of Retail Distribution in the United States, Michigan* State University Business Topics, Summer, 1967, pp. 26-27.

"knew the FLSA was in the picture"—*Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139 (5th Cir., 1972), "willful" violation standard—accomplishes when applied to "equal pay" cases. Given the myriad comparisons necessary to effect EPA compliance, this incongruous result provides an additional and independent basis warranting this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by the Petitioner, the Petition for Writ or Certiorari should be granted.

Respectfully submitted,

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